United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

TODD ASHKER, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

Case No. 09-cv-05796 CW

ORDER GRANTING MOTION FOR DE NOVO DETERMINATION OF RULING REGARDING DISTRICT COURT'S JURISDICTION PENDING APPEAL AND MOTION TO STAY

(Dkt. No. 1180)

This class action for violations of 42 U.S.C. § 1983 arises out of the placement and indefinite retention of inmates by the California Department of Corrections and Rehabilitation (CDCR) in solitary confinement in Security Housing Units (SHU) on the basis of so-called gang validation. Plaintiffs, inmates in California prisons, some of whom have been in solitary confinement for more than ten years, bring this class action against Defendants, the Governor of the State of California, the Secretary of CDCR, the Chief of CDCR's Office of Correctional Safety, and the Warden of Pelican Bay State Prison, for violations of their Eighth and Fourteenth Amendment rights.

The parties entered into a settlement agreement in August 2015, whose terms, and the Court's jurisdiction to enforce the same, were set to expire in twenty-four months, unless Plaintiffs showed, pursuant to the terms of the settlement agreement, the existence of ongoing and systemic violations under the Eighth Amendment or Fourteenth Amendment as alleged in the operative complaints or arising out of the reforms required by the settlement agreement. At the end of the settlement agreement's twenty-four-month term, Plaintiffs moved for an extension, and

the undersigned referred the motion to the magistrate judge subject to de novo review pursuant to the terms of the settlement agreement. The magistrate judge found that Plaintiffs made the requisite showing of ongoing and systemic violations, and he extended the settlement agreement, and along with it the Court's jurisdiction over it, for twelve months. See Extension Order, Docket No. 1122. Both parties appealed that order directly to the Ninth Circuit, pursuant to their own agreement to bypass the district court and present their case directly to the court of appeals. Defendants moved the magistrate judge to stay the Extension Order; in that motion, Defendants also argued that the district court was divested of jurisdiction to enforce this order when they filed their notice of appeal of it. On April 10, 2019, the magistrate judge ruled that "the filing of the notice of appeal divested the court of jurisdiction as to any matters arising thereafter" because the appeal of the Extension Order fell within the scope of the collateral order doctrine. April 10 Order at 8, Docket No. 1174. He then denied the motion to stay as moot.

Now before the Court is Plaintiffs' motion for de novo review of the April 10 Order. Defendants oppose the motion. For the reasons set forth below, the Court GRANTS Plaintiffs' motion for de novo review of the April 10 Order, and concludes that the appeal of the Extension Order did not divest the district court of jurisdiction to enforce it, and that Defendants have not met their burden to show that a stay of the order pending the appeal is warranted.

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BACKGROUND

I. Claims and Procedural History

Plaintiffs Todd Ashker and Danny Troxell had lived in solitary confinement in Pelican Bay's SHU for over two decades. Docket No. 1, Compl. ¶¶ 16-18. On December 9, 2009, they filed this lawsuit challenging the conditions of their confinement. Their pro se complaint charged various CDCR officials with violating their First, Fifth, Eighth, and Fourteenth Amendment rights. Id. ¶ 8.

On September 10, 2012, after securing counsel, Ashker and Troxell filed a second amended complaint (2AC) converting this suit into a putative class action and joining eight other long-term SHU inmates as plaintiffs. 2AC ¶ 1, Docket No. 136. In their 2AC, Plaintiffs assert that lengthy exposure to the conditions inside the Pelican Bay SHU violates the Eighth Amendment's ban on cruel and unusual punishments. Id. ¶¶ 177-92. Specifically, they allege that "the cumulative effect of extremely prolonged confinement, along with denial of the opportunity of parole, the deprivation of earned credits, the deprivation of good medical care, and other crushing conditions of confinement at the Pelican Bay SHU" have caused them significant harm, both physically and psychologically. Id. ¶¶ 180-81. They claim that SHU inmates are forced to "languish, typically alone, in a cramped, concrete, windowless cell, for 22 and one-half to 24 hours a day" without access to "telephone calls, contact visits, and vocational, recreational or educational programming." Id. ¶ 3.

Plaintiffs also assert that CDCR's procedures for assigning inmates to the SHU violate the Fourteenth Amendment's guarantee of due process. Id. ¶¶ 193-202. According to Plaintiffs, CDCR assigns inmates to the SHU based solely on their membership in or association with prison gangs, without regard for the inmate's "actual behavior." Id. ¶¶ 91-92. CDCR relies instead on the word of confidential informants and various indicia such as "gang-related art, tattoos, or written material" to determine whether inmates are affiliated with a gang – a process known as "gang validation." Id. ¶ 92. Inmates who have been validated as gang members or associates are assigned to the SHU for an indefinite term. Id. ¶¶ 92-94. Once inside the SHU, inmates receive periodic reviews every six months to determine whether they should be released into the prison's general population. Id. ¶¶ 96-97. Plaintiffs allege that these reviews are essentially "meaningless," because they require inmates to "debrief" – that is, to renounce their membership in the gang and divulge the gang's secrets to prison officials in order to secure release. Id. ¶¶ 96-97, 7. Plaintiffs contend that debriefing is not a viable option for most inmates, who either know no such secrets or who believe that debriefing "places [them] and their families in significant danger of retaliation" from other prisoners or their associates outside. Id. ¶ 7. CDCR also conducts reviews of SHU inmates' gang affiliation status every six years to determine whether they are still "active" gang members or associates. Id. ¶¶ 102-04. As with the six-month reviews, however, Plaintiffs aver that this process typically only leads to the inmate's release from the SHU if the inmate is

willing to debrief. Id. Plaintiffs allege, in short, that they have effectively been denied "information about an actual path out of the SHU, besides debriefing." Id. ¶ 117. They allege that they "are entitled to meaningful notice of how they may alter their behavior to rejoin general population, as well as meaningful and timely periodic reviews to determine whether they still warrant detention in the SHU." Id. ¶ 200.

Plaintiffs' 2AC seeks declaratory and injunctive relief. In particular, Plaintiffs request "alleviation of the conditions of confinement" in the SHU, meaningful review of the continued need for solitary confinement of all inmates who have been in the SHU for over six months, and release from the SHU of every inmate who has spent over ten years there. Id. at ¶¶ 45-46; 202. They have not asserted any claims for monetary damages.

Defendants moved to dismiss the complaint in December 2012. They argued, among other things, that Plaintiffs' due process claim was moot because CDCR had implemented in October 2012 a new set of procedures, collectively known as the "Security Threat Group" (STG) pilot program to review existing SHU assignments and transfer certain SHU inmates into the general population. The Court rejected that argument in its April 2013 order denying Defendants' motion to dismiss. It found that the implementation of the STG pilot program was not sufficient to render Plaintiffs' claims moot because CDCR had not implemented the program permanently and, at that time, all ten Plaintiffs remained subject to the preexisting procedure.

On May 2, 2013, Plaintiffs moved for class certification under Federal Rules of Civil Procedure 23(b)(1) and 23(b)(2).

The motion remained pending for nearly a year at the parties' request while they engaged in settlement negotiations. On May 14, 2014, however, the parties notified the Court that they were not able to reach a settlement. On June 2, 2014, the Court granted in part and denied in part Plaintiffs' motion for class certification. The Court certified two classes under Rules 23(b)(1) and 23(b)(2): (1) a Due Process Class comprised of all inmates who are assigned to an indeterminate term at the Pelican Bay SHU on the basis of gang validation, under the policies and procedures in place as of September 10, 2012; and (2) an Eighth Amendment Class comprised of all inmates who are now, or will be in the future, assigned to the Pelican Bay SHU for a period of more than ten continuous years. Order at 21, Docket No. 317.

On October 17, 2014, CDCR permanently implemented the Security Threat Group (STG) policy, first piloted in October 2012. See 15 Cal. Code Regs. § 3000, et seq.; Settlement Agreement ¶ 6, Docket No. 424-2. This policy alters aspects of CDCR's gang validation process and its practice of imposing indeterminate terms in Pelican Bay's SHU. STG, in part, allows Pelican Bay's SHU inmates to "step down" from the most restrictive placement in the SHU to less restrictive housing conditions, provided that the inmate fulfills certain obligations.

On March 9, 2015, the Court granted Plaintiffs' motion to file a supplemental complaint, which alleges a supplemental Eighth Amendment claim on behalf of a putative class of gang-validated inmates who were housed at Pelican Bay's SHU for more than ten years and who have been or will be transferred, under

the Step Down Program, to a SHU at another CDCR facility. See Order, Docket No. 387; Supp. Compl., Docket No. 388. In this pleading, Plaintiffs allege that their prolonged placement in any combination of SHUs constitutes cruel and unusual punishment. The Court ruled that the new allegations in the Supplemental Complaint would not be litigated until after the conclusion of the trial based on the 2AC allegations. Order at 11, Docket No. 387; Order, Docket No. 393.

On September 2, 2015, the parties jointly moved for preliminary approval of a settlement agreement (SA) that would resolve all claims in the 2AC and Supplemental Complaint.

The Court granted preliminary approval to the settlement agreement on October 14, 2015, and it granted final approval on January 26, 2016. Docket Nos. 445, 488. In accordance with the settlement agreement, the Court retained jurisdiction to enforce it. Docket No. 488 at 2.

II. Relevant Terms of the Settlement Agreement

The key terms of the settlement agreement include the following: (1) requiring CDCR to no longer place inmates in any SHU, administrative segregation, or the Step Down Program solely on the basis of gang validation; (2) requiring the creation of the Restrictive Custody General Population Unit (RCGP), to provide inmates with increased opportunities for social interaction and programming; (3) requiring that no inmate be placed in the Pelican Bay SHU for more than five continuous years; (4) requiring the Step Down Program to be shortened to two years; and (5) requiring CDCR to train staff to ensure that confidential information used against inmates is accurate and to

promote the implementation and management of the procedures and policies described in the settlement agreement. See, e.g., SA ¶¶ 13-36, Docket No. 424-2.

Paragraph 41 of the settlement agreement permits Plaintiffs to seek an extension of the agreement "and the Court's jurisdiction over this matter" of not more than twelve months; to obtain the extension, Plaintiffs must demonstrate "by a preponderance of the evidence" that current and ongoing systemic violations of the Eighth or Fourteenth Amendments exist as alleged in the Second Amended Complaint, or Supplemental Complaint, or as a result of CDCR's reforms to its Step Down Program or the SHU policies contemplated in the agreement. Id. ¶ 41. In the event that an extension beyond the initial twenty-four months is granted, CDCR's obligations with respect to the production of data and documentation would be extended for the same period. Id. ¶ 44. In the absence of this showing, the settlement agreement and the Court's jurisdiction "shall automatically terminate[.]" Id. ¶ 41.

The agreement permits Plaintiffs to seek to extend indefinitely the settlement agreement and the Court's jurisdiction so long as they make the requisite showing just described, with each extension lasting no more than twelve months. Id. ¶ 43.

The settlement agreement also contains a procedure for seeking enforcement of its terms; it requires Plaintiffs to demonstrate by a preponderance of the evidence that CDCR is in material breach of its obligations under the settlement agreement. Id. ¶ 53. Any determination by the magistrate judge

with respect to enforcement is subject to de novo review by the district court under 28 U.S.C. § 636(b)(1)(B). Id. Multiple enforcement motions have been resolved in accordance with this procedure, and appeals of several of the orders issued by the undersigned in connection with such motions are pending. See Amended Notice of Appeal, Docket No. 1117 (listing pending appeals of enforcement motions).

III. Extension of the Settlement Agreement

On November 20, 2017,[1] Plaintiffs moved for an extension of the settlement agreement under paragraph 41 on the basis of current and ongoing systemic violations of the Due Process Clause of the Fourteenth Amendment. Docket No. 898-4. Plaintiffs advanced three independent bases for extending the settlement agreement and the Court's jurisdiction (with each being sufficient to warrant an extension): (1) the misuse of unreliable confidential information by Defendants; (2) inadequate procedural protections related to placement and retention of class members in the RCGP; and (3) the retention of CDCR's old gang validations, which Plaintiffs contend ultimately resulted in a denial of a fair opportunity for parole. Id. at 1. Defendants opposed the motion.

After the undersigned referred the motion to the magistrate judge, the magistrate judge granted Plaintiffs' motion to extend the settlement agreement on January 25, 2019, finding that

[1] Plaintiffs' motion to extend the settlement agreement and the Court's jurisdiction was due on November 20, 2017, pursuant to a stipulation. See Docket No. 886 at 1. Accordingly, this motion was not untimely or in violation of the settlement agreement.

Plaintiffs had satisfied their burden under the settlement agreement to extend the same for an additional twelve months based on two of the three grounds they advanced in their motion. Docket No. 1122. Specifically, the magistrate judge found that Plaintiffs, as required by paragraph 41 of the settlement agreement, had shown by a preponderance of the evidence that Defendants had engaged in ongoing and systemic due process violations (1) through their misuse of confidential information, which had the effect of improper placement in solitary confinement; and (2) by using unreliable gang validations, which had the effect of denying class members the opportunity for a meaningful parole hearing. Extension Order at 26, Docket No. 1122. The magistrate judge further found that that these systemic violations were alleged in the Second Amended Complaint or the Supplemental Complaint, or were the result of the reforms to CDCR policies and practices required by the settlement agreement and, as such, they constituted proper bases for extending the settlement agreement. Id. The magistrate judge did not order or implement any remedies for the systemic violations he found, although he did note in his order, consistent with the settlement agreement, that "in the event of an extension of the Settlement Agreement and the court's jurisdiction over the matter beyond the initial 24-month period, Defendants' obligations of production of any agreed upon data and documentation to Plaintiffs' counsel will be extended for the same period[.]" Id. at 3.

The parties agreed to take the position that the Extension Order would be a "final order subject to appellate review[.]"

See Joint Notice at 2, Docket No. 1129. Defendants filed a notice of appeal to the Ninth Circuit on February 6, 2019, and Plaintiffs filed a notice of a cross-appeal on February 25, 2019. Docket Nos. 1126, 1130, 1131. The cross-appeals are pending. As noted above, appeals of certain of the orders issued in connection with enforcement disputes also are pending.

IV. Magistrate Judge's April 10 Ruling on Defendants' Motion to Stay the Extension Order

After the Extension Order was issued, Plaintiffs initiated the meet-and-confer process regarding Defendants' obligation under the settlement agreement to produce documents and data during the twelve-month extension. Plaintiffs then wrote a letter to the magistrate judge on February 13, 2019, requesting a telephonic status conference regarding this issue. See Docket No. 1132-1, Ex. A-C.

On February 26, 2019, Defendants moved to stay the Extension Order. Docket No. 1132. In that motion, Defendants made two arguments. First, Defendants contended that their appeal of the Extension Order divested the district court of jurisdiction "over matters relating" to that order. Mot. at 3-4, Docket No. 1132. Second, Defendants contended, in the alternative, that if the district court was not divested of jurisdiction by their appeal of the Extension Order, then the order should be stayed pending the appeal on the ground that they would suffer irreparable harm if they were required to produce documents and data or enact policy changes during the twelve-month extension. Id. at 3-12.

Plaintiffs opposed the motion. Docket No. 1147. They argued that the district court was not divested of jurisdiction

by Defendants' appeal of the Extension Order, and that the court therefore has jurisdiction to enforce the twelve-month extension of the agreement, including Defendants' obligations to produce documents and data during the extension, and to design a remedy consistent with the systemic constitutional violations that justified the extension. Id. at 3-4. At present, Plaintiffs do not request that remedies be designed. See Motion at 5, Docket No. 1180. They also argued that Defendants did not make the requisite showing to justify a stay of the Extension Order. Specifically, Plaintiffs argued that Defendants cannot suffer irreparable harm from being ordered to comply with their production or other obligations under the settlement agreement during the twelve-month extension because Defendants agreed to undertake such obligations in the event of an extension.

The magistrate judge held a teleconference on March 5, 2019, during which he indicated that he would resolve this dispute in conjunction with the motion Defendants had filed to stay the Extension Order. Docket No. 1191-2.

On April 10, 2019, the magistrate judge held that this case involves an asserted "right to avoid further proceedings at all, which compels divestiture of those aspects of the case arising after the filing of the notice of appeal as to the Extension Order" based on the collateral order doctrine. April 10 Order at 6-8, Docket No. 1174. He then denied Defendants' motion to stay as moot. Id.

V. Plaintiffs' Motion for De Novo Review of April 10 Ruling that District Court Was Divested of Jurisdiction

Plaintiffs now move for de novo review of the April 10 Order

based on these grounds: (1) that the district court was not divested of jurisdiction by the appeal of the Extension Order and has the authority to implement and enforce the Extension Order; (2) that the magistrate judge incorrectly applied the collateral order doctrine; and (3) that Defendants have not shown that a stay is warranted. Docket No. 1180.

Defendants oppose the motion, arguing that Plaintiffs' motion is based on the wrong standard because the April 10 Order is not subject to de novo review. Docket No. 1187. Defendants further contend (1) that the collateral order doctrine permits an immediate appeal of the Extension Order because they have "immunity" from further litigation given that the settlement agreement's twenty-four-month period has expired; (2) that the district court was divested of jurisdiction to enforce the Extension Order by their appeal of the order; and (3) that, if the district court was not divested of jurisdiction, then the action should be stayed pending appeal, because they are likely to suffer irreparable harm if its order is enforced. Docket No. 1196.

ANALYSIS

I. The April 10 Order Is Subject to De Novo Review

The Court first addresses the parties' dispute with respect to the standard for reviewing the April 10 Order. It concludes that the applicable standard of review is de novo.[2]

First, the April 10 Order resolved a motion by Defendants to

[2] As will be discussed below, even if the standard for reviewing the April 10 Order were "clearly erroneous or contrary to law," the result would be the same.

stay the action, as well as a pending dispute regarding Defendants' obligations under the settlement agreement to produce documents and data during the twelve-month extension. Disputes of that nature are subject to de novo review under the terms of the settlement agreement. See SA ¶¶ 39, 53. At the time Defendants filed the motion to stay, a dispute regarding Defendants' production obligations during the extension was pending. See Docket No. 1132-1, Ex. A-C; see also Extension Order at 6, Docket No. 1147 (noting that "[w]hile the case remains pending in the appellate court, Plaintiffs have 'initiated the process for continued monitoring' by demanding document production from Defendants"). Although Plaintiffs did not file a motion for document production, per se, Plaintiffs raised the dispute regarding production during the teleconference with the magistrate judge, who indicated that he would resolve that dispute in conjunction with Defendants' motion to stay. Docket No. 1191, Ex. 1 at 15-17. Accordingly, because the April 10 Order was intended to resolve a dispute regarding Defendants' document production obligations, it falls within the scope of paragraph 53 of the settlement agreement and is thus subject to de novo review under 28 U.S.C. § 636(b)(1)(B).[3] See SA ¶ 39 ("Any disputes regarding data and document production shall be submitted to Magistrate Judge Vadas in accordance with the

[3] 28 U.S.C. § 636(b)(1)(B) provides that "[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions." Findings and recommendations made pursuant to Section 636(b)(1)(B) are subject to de novo review by the district judge. See 28 U.S.C. § 636(b)(1)(C).

dispute resolution and enforcement proceedings set forth in Paragraphs 52 and 53 [of the Settlement Agreement]."); SA ¶ 53 ("An order issued by Magistrate Judge Vadas under this Paragraph is subject to review under 28 U.S.C. § 636(b)(1)(B).").

Second, 28 U.S.C. § 636(b)(1)(B) specifically identifies prisoner petitions challenging conditions of confinement as matters that can be referred to a magistrate judge subject to de novo review. The Ninth Circuit has interpreted prisoner petitions as "including section 1983 actions" and "conditions of confinement" as those that relate to "ongoing prison practices and regulations with regard to matters such as placement in maximum security, deadlocks, unhealthy living conditions . . . and cruel and unusual punishment by prison authorities." See Houghton v. Osborne, 834 F.2d 745, 748-50 (9th Cir. 1987) (citation and internal quotation marks omitted). Issues of this nature are the subject of this Section 1983 action. As such, reviewing the April 10 Order de novo is consistent with the language and spirit of 28 U.S.C. § 636(b)(1)(B).

II. The District Court Was Not Divested of Jurisdiction by Defendants' Appeal of the Extension Order

A. The Court Has the Authority to Implement and Enforce the Extension Order

A federal circuit court has jurisdiction over appeals from "final decisions" of the district courts. See 28 U.S.C. § 1291. "A final decision is typically one by which a district court disassociates itself from a case. If non-final decisions were generally appealable, cases could be interrupted and trials postponed indefinitely as enterprising appellants bounced matters between the district and appellate courts. Costs would be

inflated by such a multiplication of proceedings, and district courts would be inhibited in their ability to manage litigation efficiently[.] Moreover, piecemeal appeals would undermine the independence of the district judge." SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720, 723 (9th Cir. 2017) (internal citations and quotation marks omitted).

"In limited circumstances, however, appeals may be allowed before a final judgment. For example, a district court may certify an order for an immediate appeal. See 28 U.S.C. § 1292(b). Alternately, some statutes and rules allow an early appeal of decisions on certain specific issues. Relief from a court order may also be obtained in extraordinary circumstances through a writ of mandamus." Id. (final citation omitted). Alternatively, "a piece of the case may become effectively 'final' under the collateral-order doctrine, even though the case as a whole has not ended." Id. (citing Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)). The collateral order doctrine is discussed in more detail in the next section.

Under the judicially-created divestment doctrine, the filing of a notice of appeal divests the district court of jurisdiction over aspects of a case involved in the appeal. In re Padilla, 222 F.3d 1184, 1190 (9th Cir. 2000) (citation omitted). The purpose of divestment is to "avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time.'" Id. (citation omitted). "This rule is not absolute. For example, a district court has jurisdiction to take actions that preserve the status quo during the pendency of an appeal, but may not finally adjudicate substantial rights

directly involved in the appeal. Absent a stay or supersedeas, the trial court also retains jurisdiction to implement or enforce the judgment or order but may not alter or expand upon the judgment." Id. (internal citations and quotation marks omitted).

The Extension Order is not a final order within the meaning of Section 1291, because rather than ending the litigation, it extended the settlement agreement and the Court's jurisdiction for another twelve months. Cf. SolarCity Corp., 859 F.3d at 723 ("A final decision is typically one by which a district court disassociates itself from a case.") (citation omitted).

The appeal of the Extension Order[5], which is interlocutory, does not preclude the Court from enforcing or implementing the Extension Order, as well as the terms of the settlement agreement that are automatically triggered by the Extension Order, for the twelve-month extension period. See In re Padilla, 222 F.3d at 1190 (a notice of appeal does not preclude a court from implementing or enforcing the order on appeal so long as it does not "alter or expand" it); GTE Sylvania, Inc. v. Consumers Union of U.S., Inc., 445 U.S. 375, 386 (1980) ("[P]ersons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order.").

[5] The Ninth Circuit may not accept the parties' attempt to appeal directly to it the magistrate judge's Extension Order. A magistrate judge's order can be appealed directly to a court of appeals instead of the district judge only if it was issued under the consent statute, 28 U.S.C. § 636(c). 28 U.S.C. § 636(c)(3). The magistrate judge's Extension Order was not issued pursuant to the consent statute; accordingly, Defendants' appeal of the Extension Order may be defective.

In Britton v. Co-op Banking Grp., 916 F.2d 1405, 1412 (9th Cir. 1990), the Ninth Circuit held that an appeal of an interlocutory order denying a motion to compel arbitration did not divest the district court of jurisdiction to enter subsequent orders. The court of appeals distinguished orders and actions by the district court that involve "moving the case along consistent with its view of the case as reflected in its order denying arbitration," which are within the district court's jurisdiction pending appeal, from orders and actions that would effectuate "a change in the result of the very issue on appeal," which fall outside of the district court's jurisdiction pending appeal. Id. at 1411-12 (emphasis added). The latter are inappropriate because they would force the court of appeals to "deal[] with a moving target." Id.

Here, enforcing the terms of the settlement agreement and taking any judicial action under that contract during the twelve-month extension period is permissible, because doing so would not alter or modify the matters determined in the Extension Order, namely, whether Plaintiffs met their burden to show that the twelve-month extension is warranted. See id.; cf. McClatchy Newspapers v. Central Valley Typo. Union No. 46, 686 F.2d 731 (9th Cir.1982) (holding that it was error for district court to modify the judgment being appealed while the appeal was pending).

Notwithstanding the foregoing, Defendants contend that the district court was divested of jurisdiction to enforce the Extension Order and any matters arising therefrom on the ground that their appeal of that order falls within the collateral order doctrine, which permits an interlocutory order to be treated as

"final" for the purpose of permitting an immediate appeal under 28 U.S.C. § 1291. The Court concludes, for the reasons discussed below, that this argument is unavailing.

B. The Collateral Order Doctrine Does Not Apply to the Appeal of the Extension Order

The collateral order doctrine is "best understood" as a "practical construction" of "the final decision rule laid out" in 28 U.S.C. § 1291. Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (citation internal quotation marks omitted). It permits a court of appeals to "treat[] as final" an interlocutory order so that it can be immediately appealed under Section 1291. Id. (citation internal quotation marks omitted). "The collateral-order doctrine has three requirements. First, an interlocutory order can be appealed only if it is conclusive. Second, the order must address a question that is separate from the merits of the underlying case. Third, the separate question must raise some particular value of a high order and evade effective review if not considered immediately. All three requirements must be satisfied for the ruling to be immediately appealable." SolarCity Corp., 859 F.3d at 724 (internal citations and quotation marks omitted). These three requirements have been referred to as the "Cohen test." See Digital Equip., 511 U.S. at 869 (referring to Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949)).

"The Supreme Court has repeatedly emphasized that these requirements are stringent and that the collateral-order doctrine must remain a narrow exception. In addition, the Court has held that in evaluating these three requirements, [courts] must

consider the entire category to which a claim belongs. As long as the class of claims, taken as a whole, can be adequately vindicated by other means, the chance that the litigation at hand might be speeded, or a particular injustice averted, does not provide a basis for jurisdiction under § 1291." SolarCity Corp., 859 F.3d at 724 (citations omitted).

Because the scope of the collateral order doctrine is so narrow, the doctrine has been applied in a very limited set of circumstances, namely where a party successfully asserts a constitutional or statutory immunity from suit or trial. For example, the doctrine has been applied to interlocutory denials of certain "particularly important immunities from suit," such as "denials of Eleventh Amendment immunity," absolute and qualified immunity, "foreign sovereign immunity," and "tribal sovereign immunity." Id. at 725 (citations omitted). In the criminal context, the collateral order doctrine has been applied to permit immediate appeals of interlocutory orders where the defendant asserts a constitutional right not to be tried or a constitutional immunity to being subjected to litigation. See, e.g., Abney v. United States, 431 U.S. 651, 659-61 (1977) (applying collateral order doctrine where criminal defendant argued that he was immune from second trial based on the Double Jeopardy Clause of the Fifth Amendment, reasoning that the defendant was "contesting the very authority of the Government to hale him into court to face trial" and that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review on double jeopardy claims were postponed until after conviction and sentence");

Helstoski v. Meanor, 442 U.S. 500, 508 (1979) (holding that interlocutory order could be immediately appealed under the collateral order doctrine to permit a United States Congressman to assert the immunity conferred upon him by the Speech or Debate Clause, reasoning that the Clause protects Congressmen "not just from the consequences of litigation's results but also from the burden of defending themselves"). These asserted immunities from suit or trial, when valid, can satisfy the third element of the Cohen test, namely that the order being appealed resolve an important question that would be effectively unreviewable if not considered immediately.

Where an interlocutory order is immediately appealable under the collateral order doctrine, the district court is automatically divested of jurisdiction to proceed pending appeal, unless the district court certifies that the appeal is frivolous or another exception applies. See Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) (emphasis added); see also United States v. Claiborne, 727 F.2d 842, 850-51 (9th Cir. 1984) (where an interlocutory claim in a criminal case is considered immediately appealable based on a "right not to be tried," the district court loses its power to proceed from the time the notice of appeal is filed until the appeal is resolved unless the appeal is found to be frivolous by the district court).

Here, the only basis that Defendants have advanced for applying the collateral order doctrine, and for arguing that the district court was divested of jurisdiction to enforce the Extension Order, is one that the Ninth Circuit and the Supreme Court have expressly rejected. Defendants assert that the

application of the collateral order doctrine, and the district court's purported divestment of jurisdiction over this litigation, is appropriate based on their asserted "immunity from continuing with the case," which they claim arises, not from statute or the Constitution, but from the notion that this litigation ended at the conclusion of the settlement agreement's initial twenty-four-month term, and from the notion that litigation activity between the notice of appeal and the reversal would be a "waste" if they prevail on appeal. See Supp. Opp'n at 3-4, Docket No. 1196.

The Ninth Circuit and the Supreme Court specifically have declined to allow immediate appeals under the collateral order doctrine where the "immunity" asserted is a desire "to avoid litigation[.]" See SolarCity Corp., 859 F.3d at 727; Will v. Hallock, 546 U.S. 345, 354 (2006) (rejecting application of collateral order doctrine based only on the asserted right to avoid litigation, reasoning that if that alone were accepted as a justification for an immediate interlocutory appeal, then "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight").

Particularly apt here is the Supreme Court's express rejection of an asserted "privately negotiated right to be free from suit," pursuant to a settlement agreement, as a basis for permitting an immediate appeal under the collateral order doctrine. See Digital Equip., 511 U.S. at 876-77. In Digital Equipment, the parties entered into a settlement agreement that ended the litigation. Id. at 865-867. Then, one of the parties moved to rescind the agreement, and the district court granted

the motion and vacated the dismissal of the case. Id. The other party then sought an immediate appeal of that interlocutory order based on the argument that its "right not to go to trial" under the settlement agreement justified permitting an immediate appeal under the collateral order doctrine. Id. The Supreme Court rejected that argument, reasoning that, if a privately negotiated right not to go to trial were a proper ground for applying the collateral order doctrine, then "any district court order denying effect to a settlement agreement could be appealed immediately." Id. at 877. It held that an asserted right to be free from suit derived "by agreement does not rise to the level of importance needed for recognition under § 1291." Id. at 878.

Defendants' asserted "immunity" from further proceedings in this action stems from their view that, pursuant to the parties' privately negotiated settlement agreement, this litigation should have ended when the settlement agreement's initial twenty-four month expired. As in Digital Equipment, Defendants here have invoked the collateral order doctrine to justify their immediate appeal of an interlocutory order that, in their view, has deprived them of a privately negotiated right to be free from litigation. For the same reasons that the Supreme Court declined to recognize the immediate interlocutory appeal in Digital Equipment as valid under the collateral order doctrine, the Court will do the same here.

The collateral order doctrine cannot be applied to permit an immediate appeal solely because the appeal is of an interlocutory order that denied a motion that could have, or should have, ended the litigation; that is because "virtually every right that could

be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial[.]'" Id. at 873. Without more, that circumstance does not give rise to the existence of valid "right not to be tried" that would satisfy the third element of the Cohen test. See United States v. Hollywood Motor Car Co., 458 U.S. 263, 269 (1982) (noting that a "crucial distinction" exists between "a right not to be tried and a right whose remedy requires the dismissal" of charges or claims, and holding, "The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not"). Accordingly, "§ 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye." Digital Equip., 511 U.S. at 873. Only an "explicit statutory or constitutional guarantee that trial will not occur . . . could be grounds for an immediate appeal of rights under § 1291." Id. at 874.

Defendants have not meaningfully addressed or distinguished these authorities.

Accordingly, because Defendants' purported right to avoid further litigation based on their privately negotiated agreement cannot satisfy the third element of the Cohen test as a matter of law, Defendants' invocation of the collateral order doctrine as a basis for arguing that their appeal was proper, and that, therefore, the district court was divested of jurisdiction over this litigation, fails. For the same reasons, the magistrate judge's ruling that the court is divested of jurisdiction to enforce the Extension Order because Defendants' appeal satisfied

the requirements of the collateral order doctrine was clearly erroneous and contrary to law.

It's worth noting that other reasons prevent the application of the collateral order doctrine to Defendants' appeal of the Extension Order. For example, the Supreme Court has held that the doctrine cannot be applied where "the class of claims [to which the appeal belongs], taken as a whole, can be adequately vindicated by other means[.]" Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107 (2009). The class of orders to which the Extension Order belongs, which are orders that extend or refuse to extend an injunctive settlement agreement or consent decree, could be appealed under 28 U.S.C. § 1292(a)(1). That statute permits appeals of an interlocutory order "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]" See 28 U.S.C. § 1292(a)(1). Orders, like the Extension Order, which extend a settlement agreement that contains injunctive elements and that was incorporated by reference in a court order, could satisfy the requirements for an appeal under Section 1292(a)(1). See Thompson v. Enomoto, 815 F.2d 1323, 1326 (9th Cir. 1987) (holding that an order is injunctive within the meaning of Section 1292(a)(1) if it has the "practical effect of the grant or denial of an injunction").

Defendants' argument to the contrary is unpersuasive. Defendants contend that their appeal of the Extension Order cannot fall within the scope of 28 U.S.C. § 1292(a)(1) because the "Extension Order does not order Defendants to do anything." Supp. Opp'n at 4, Docket No. 1196. But Defendants ignore other

aspects of the Extension Order, which recognize that, in the event the settlement agreement is extended, Defendants' production and other obligations under the settlement agreement will continue for the duration of the extension. See Extension Order at 3. Additionally, the Extension Order has the effect of giving new life, for twelve months, to the settlement agreement, which is injunctive in nature given that it requires both parties to take and refrain from certain actions; as such, the Extension Order "continues" an injunction within the meaning of Section 1292(a)(1).

Accordingly, the viability of an alternative path to immediate appeal weighs against finding that the Extension Order is immediately appealable under the collateral order doctrine.

III. Defendants Have Not Shown that a Stay is Warranted

Having found that the Court is not divested of jurisdiction to enforce and implement the Extension Order, it now turns to Defendants' motion for a stay pending their appeal of the Extension Order.[8]

A request for stay calls for the "consideration of four factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether

[8] Defendants contend that their request for a stay should be decided by the magistrate judge in the first instance, but they point to no authority preventing the undersigned from deciding the motion to stay now, without first referring it to the magistrate judge. Because the motion to stay is within the undersigned's authority and resolving it now will promote efficiency and prevent undue delay, and because the motion has been fully briefed by both sides and the underlying facts are not in dispute or in need of supplementation, the Court will resolve the motion.

issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." Nken v. Holder, 556 U.S. 418, 434 (2009) (citations and internal quotation marks omitted). The "preservation of the status quo" is not among the "factors regulating the issuance of a stay." See Golden Gate Rest. Ass'n v. City & Cty. Of San Francisco, 512 F.3d 1112, 1116 (9th Cir. 2008) (noting that "[m]aintaining the status quo is not a talisman").

Courts evaluate these factors on a continuum. Id. at 1115-16. "At one end of the continuum, the moving party is required to show both a probability of success on the merits and the possibility of irreparable injury." Id. at 1115 (citation and internal quotation marks omitted). "At the other end of the continuum, the moving party must demonstrate that serious legal questions are raised and that the balance of hardships tips sharply in its favor." Id. at 1116 (citation and internal quotation marks omitted). "These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." Id. (citation and internal quotation marks omitted).

"A stay is not a matter of right, even if irreparable injury might otherwise result. It is instead an exercise of judicial discretion, and [t]he propriety of its issue is dependent upon the circumstances of the particular case. The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." Nken, 556 U.S. at 433-34 (citations and internal quotation marks omitted).

Here, Defendants have failed to meet their burden to show that a stay is warranted.

As to the first factor, the likelihood of success on the merits, Defendants contend that they are likely to succeed on appeal because the Extension Order was predicated on findings of two categories of ongoing and systemic violations, which Defendants argue are not proper grounds for extending the settlement agreement because the violations "did not stem from the constitutional claims alleged in Plaintiffs' complaint or the policy changes contemplated by the Agreement." Motion at 6, Docket No. 1132. Defendants also argue that the magistrate judge simply accepted Plaintiffs' interpretation of the evidence "without any independent analysis, and without considering Defendants' interpretation of that evidence." Id. at 7.

To prevail on appeal, Defendants must show that neither of the two predicates for the Extension Order is a proper ground for extending the settlement agreement. But Defendants have not shown any likelihood that they will be able to do so. Contrary to Defendants' position, each of the two categories of ongoing and systemic violations that served as predicates for the Extension Order is within the scope of the operative complaints or the reforms contemplated by the settlement agreement; as such, each constitutes a proper, independent basis for extending the settlement agreement under paragraph 41.

One of the predicates for the Extension Order was a finding that ongoing and systemic due process violations were caused by CDCR's reliance on fabricated or inadequately disclosed confidential information, or by CDCR's failure to independently

assess the reliability of confidential information. Extension Order at 26. Because the settlement agreement requires CDCR to take certain steps to ensure that the use of confidential information against inmates "is accurate," see, e.g., SA ¶ 34, these violations arise out of the reforms contemplated by the settlement agreement, and therefore constitute a proper ground for extending the settlement agreement under paragraph 41. The other predicate of the Extension order is the finding that ongoing and systemic violations of due process were caused by the continued use of flawed gang validations, because such validations resulted in the denial to inmates of a fair opportunity for parole. These violations also serve as a proper ground for extending the settlement agreement under paragraph 41, because the 2AC contains allegations that gang validations could and did ultimately result in the denial of a fair opportunity for parole. See, e.g., 2AC ¶¶ 87-90; 171, 187, 196, 199.

Further, nothing in the Extension Order suggests that the magistrate judge failed to consider Defendants' interpretation of, or failed to properly analyze, the evidence. See, e.g., Extension Order at 20 (noting that, because Defendants failed to submit any evidence, "the only task at hand is to evaluate Plaintiffs' evidence in light of Defendants' arguments").

Defendants therefore have failed to show any meaningful likelihood of success on the merits. Nken, 556 U.S at 434 (2009) ("It is not enough that the chance of success on the merits be better than negligible.") (citation and internal quotation marks omitted). Accordingly, to justify a stay, Defendants' showing of irreparable harm must be very strong. See Golden Gate, 512 F.3d

at 1116 ("[T]he required degree of irreparable harm increases as the probability of success decreases.") (citation and internal quotation marks omitted).

Defendants have not shown that they are likely to suffer any irreparable harm absent a stay. Defendants argue that, without a stay, they "will be subject to a burdensome and costly twelve months of monitoring, document production, conferences, enforcement motions, and a second extension motion." Supp. Opp'n at 6. They also argue that they will be required to "engage in extensive document collection and production," the scope of which, according to Defendants, falls outside of the scope of the settlement agreement and the matters addressed in the Extension Order. Motion at 9-11, Docket No. 1132. Finally, they argue that "CDCR will be forced to reform policies and practices for purported due process violations that are being challenged on appeal, and which Defendants maintain were never part of this case." Id. at 8, Docket No. 1132.

These arguments are unpersuasive. It is well-established that ongoing litigation and related expenses do not constitute irreparable harm of the type that would warrant a stay. See, e.g., Mohamed v. Uber Techs., 115 F. Supp. 3d 1024, 1032-33 (N.D. Cal. 2015) (holding that "ongoing litigation and discovery expense" do not amount to irreparable harm). Further, the sources of irreparable harm that Defendants have identified (i.e., monitoring, enforcement, etc.) arise out of contractual obligations to which Defendants agreed. Under the terms of the settlement agreement, the parties' rights and obligations, including Defendants' obligation to produce documents and data,

are automatically extended for the duration of any extension of the settlement agreement. See, e.g., SA ¶ 44 ("To the extent that this Agreement and the Court's jurisdiction over this matter are extended beyond the initial twenty-four month period, CDCR's obligations and production of any agreed upon data and documentation to Plaintiffs' counsel will be extended for the same period."). Irreparable harm cannot result from obligations that Defendants agreed to undertake.

Defendants express concern with respect to the scope of the documents and data that Plaintiffs have requested, but they have not shown that present or future disputes about the scope of their contractually-required productions can be a proper basis for a finding of irreparable harm. Here, as discussed above, the settlement agreement is clear that Defendants' production obligations continue during any extension of the agreement. The scope and nature of the documents and data that Defendants are obliged to produce must agreed upon, according to the settlement agreement. See SA ¶ 37. If the parties are unable to reach an agreement on the scope of production, the parties can avail themselves of the dispute-resolution process set forth in the settlement agreement. See id. ¶ 39 (providing that any "disputes regarding data and document production" are to be resolved by the magistrate judge in accordance with the procedures set forth in paragraphs 52 and 53 of the settlement agreement). In light of these pre-existing mechanisms, to which Defendants themselves agreed, the existence of any present or future disputes regarding production does not weigh in favor of a stay.

Finally, Defendants' contention that they will be irreparably harmed if no stay is entered because they will be "forced" to implement reforms and change policies is unconvincing.[10] The settlement agreement does not contain any term that would make the implementation of new reforms or policy changes automatic following the extension of the agreement. As discussed above, the settlement agreement permits the parties to avail themselves of procedures to enforce its terms. Whether any new reforms or policy changes emerge from such enforcement procedures remains to be seen. At present, the Court finds that it would be inappropriate to issue a stay based on the possibility that new reforms and policy changes could be explored in the future, particularly given that Defendants retain the right to request, if and when any such remedies are crafted pursuant to the settlement agreement, that their implementation be stayed pending appeal or otherwise.

Because the "most critical" factors in considering whether a stay is warranted are likelihood of success on the merits and irreparable harm, Nken, 556 U.S. at 434 (2009), Defendants' failure to show that either of these factors weighs in favor of a stay is sufficient to deny their motion.

[10] Plaintiffs initially requested that the Court "order the parties to meet and confer to present either a joint or separate remedial plans, followed by the issuance of a remedial order and consideration of whether to stay implementation of remedies until the Ninth Circuit rules" on the appeal. Docket No. 1147 at 14. But Plaintiffs currently "do not seek de novo review" of the magistrate judge's rejection of their request for the design of remedies for the systemic constitutional violations identified in the Extension Order. See Motion at 5, Docket No. 1180.

The Court notes, for completeness, that the remaining factors, namely the likelihood of injury to Plaintiffs if a stay is issued, and the public interest, both weigh against entering a stay. The public interest, and the interests of the class members, would be served by the efficient and effective provision of constitutional due process to California inmates. The recent findings in the Extension Order show that significant and systemic due process violations continue to take place. Staying this litigation while the appeal is pending would contravene these interests, because it could facilitate future violations of the type the settlement agreement was intended to redress and prevent.

Accordingly, the Court DENIES Defendants' motion to stay the Extension Order pending their appeal.

CONCLUSION

For the reasons set forth above, the Court concludes that it is not divested of jurisdiction to enforce the Extension Order in light of Defendants' appeal of the order. The Court declines to exercise its discretion to stay the order pending that appeal.

In accordance with the terms of the settlement agreement, the parties' and the Court's obligations under that contract, including Defendants' obligations to produce documents and data, will continue for the duration of the twelve-month extension of the agreement. Defendants shall resume forthwith their production of the same types and quantities of documents and data they had agreed to produce prior to the expiration of the original twenty-four-month period of the settlement agreement. The twelve-month extension will begin on the date Defendants make

their first complete production of such documents and data. To the extent that Plaintiffs seek documents or data during the twelve-month extension that go beyond the parties' prior agreements as to the scope of Defendants' productions, the parties shall promptly resume the dispute-resolution process, pursuant to the terms of the settlement agreement, with respect to any such requests for documents and data.

IT IS SO ORDERED.

Dated: June 26, 2019

CLAUDIA WILKEN
United States District Judge

United States District Court
Northern District of California